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# In the
# United States Court of Appeals
# For the Seventh Circuit

No. 95-1842

BILL SAMPLEY AND MICHAEL HOLLAND,

*Plaintiffs-Appellees*,

*v.*

JACK DUCKWORTH, in his personal capacity,

*Defendant-Appellant*.

Appeal from the United States District Court
for the Northern District of Indiana, South Bend Division.
No. 88 C 405--**Robert L. Miller, Jr.**, Judge.

ARGUED SEPTEMBER 15, 1995-DECIDED DECEMBER 19, 1995

Before POSNER, *Chief Judge*, and CUDAHY and MANION, *Circuit Judges*.

CUDAHY, *Circuit Judge*. This case presents only one issue: whether district courts have authority to impose upon a losing plaintiff the expenses incurred by state corrections officials in transporting prisoners to be witnesses in a civil suit. The case had its origins in a civil rights suit brought by plaintiffs Bill Sampley and Michael Holland against the Superintendent of the Indiana State Prison, Jack Duckworth, involving conditions at that institution. During the course of the lawsuit the district court issued orders of transportation requiring the Indiana Department of Corrections to bring a number of prisoner witnesses to court to testify. The plaintiffs did not prevail in their lawsuit and costs were assessed against them in favor of the

defendant. This appeal, however, concerns a third-party application for reimbursement brought by the Indiana Department of Corrections (IDOC). IDOC asked that the district court direct the losing plaintiffs to reimburse them for the costs of transporting the prisonerwitnesses to court. The district court denied the request, on the grounds that it lacked authority to mandate such a payment. We affirm.

*Analysis*

Through the issuance of a writ of habeas corpus ad testificandum, state prison officials may be required to produce a prisoner in their custody to testify at a federal trial. The writ of habeas corpus ad testificandum is authorized by 28 U.S.C. § 2241 which provides, in relevant part:

> (a) Writs of habeas corpus may be granted by . . . the district courts . . .
>
> . . .
>
> (c) The writ of habeas corpus shall not extend to a prisoner unless–
>
> . . .
>
> (5) It is necessary to bring him into court to testify or for trial.

28 U.S.C. § 2243 further prescribes that "the writ . . . shall be directed to the person having custody of the person detained" and that "the person to whom the writ is directed shall be required to produce at the hearing the body of the person detained." This statute codifies the common law writ. The writ was initially incorporated in the federal statutes in 1789, and there is no historical requirement that

custodians be reimbursed for their costs of compliance with the writ. *See, e.g., Story v. Robinson*, 689 F.2d 1176, 1179 (3d Cir. 1982); *Sales v. Marshall*, 873 F.2d 115, 119 (6th Cir. 1989).

In this appeal IDOC does not contest that the court may order it to produce prisoner-witnesses pursuant to a writ of habeas corpus ad testificandum, nor does it suggest that the court is *required* to charge the costs of IDOC's compliance with the writ against the losing plaintiff. IDOC argues, however, that the district court erred in its belief that it lacked discretionary authority to order reimbursement of IDOC's costs of compliance. IDOC urges two possible sources of such district court authority. First, this power may be sought in the statutory framework governing reimbursement of trial costs. Alternatively, authority might be found in the common law powers associated with the writ of habeas corpus ad testificandum which were attached to it at the time it was codified. After considering each of these possible sources, we concur with the district court that nothing in either the statutory framework or the common law authorizes the requested reimbursements.

IDOC claims that its request is permitted under 28 U.S.C. § 1920, which is part of the network of statutes and rules providing for reimbursement of costs to prevailing parties in civil actions. Reimbursement for some of the costs incurred by witnesses who testify at trial is routinely awarded to *prevailing parties* under the terms of Fed. R. Civ. P. 54(d). That rule provides that, with a few exceptions not relevant here, "costs other than attorneys' fees shall be allowed as of course to the prevailing party unless the court otherwise directs . . . ." The expenses which may be taxed as costs, including expenses for witnesses, are enumerated in §1920:

> A judge or clerk of any court of the United States may tax as costs the following:
>
> . . .
>
> (3) Fees and disbursements for printing and witnesses; . . .
>
> 28 U.S.C. § 1920.

The costs permissibly paid to witnesses are specified further by 28 U.S.C. § 1821 which provides, in part:

> (a)(1) Except as otherwise provided by law, a witness in attendance at any court of the United States . . . shall be paid the fees and allowances provided by this section.
>
> . . .
>
> (f) Any witness who is incarcerated at the time that his or her testimony is given . . . may not receive fees or allowances under this section . . . .

(The elided section of part (a) contains a list of specified reimbursable expenses, such as transportation and accommodation costs.) As indicated, prisoners themselves are expressly prohibited from receiving witness fees or allowances. 28 U.S.C. § 1821(f).

IDOC argues that the scope of § 1920 extends beyond defining the costs to be paid to prevailing parties under Rule 54(d) to encompass reimbursement of third parties, such as itself, for the expenses of complying with a writ of habeas corpus ad testificandum. One of the items which, under § 1920(3), may be taxed as costs is "fees and disbursements for printing and witnesses." IDOC argues

that, while witness "fees" are those items described in sec. 1821, the "disbursements" in § 1920(3) include expenses incurred by IDOC (a non-party to the suit) in transporting witnesses in compliance with a writ of habeas corpus ad testificandum. IDOC's argument is precluded, however, by the Supreme Court's treatment of the relationship between Rule 54(d), § 1821 and sec. 1920 in *Crawford Fitting Co. v. J. T. Gibbons, Inc.*, 482 U.S. 437 (1987). That case determined that Rule 54(d) does not authorize the payment to an expert witness of any witness fees in excess of the limits imposed by § 1821 in its specification of the fees authorized by § 1920. The petitioner there argued that the scope of Rule 54(d) was broader than that of § 1920. While the appellant here urges the converse--that § 1920 is broader in scope than Rule 54(d)--the two arguments share the contention that Rule 54(d) and § 1920, while overlapping in scope, are not coextensive. The Supreme Court in Crawford rejected that contention.

In *Crawford*, the Supreme Court described the interrelation of the three provisions at issue, noting that ". . . § 1821 specifies the amount of the fee that must be tendered to a witness, § 1920 provides that the fee may be taxed as a cost, and Rule 54(d) provides that the cost shall be taxed against the losing party unless the court otherwise directs." *Crawford*, 482 U.S. at 441. Leaving no doubt as to its view of the function of § 1920, the Court opined:

> We think the better view is that § *1920 defines the term 'costs' as used in Rule 54(d)*. Section 1920 enumerates expenses that a federal court may tax as a cost under the discretionary authority found in Rule 54(d).
>
> *Id.* (emphasis added).

The Supreme Court apparently does not view § 1920 as having any role beyond the purview of Rule 54(d). Indeed, its *Crawford* holding that § 1920 exhausts *all* costs which may be taxed under Rule 54(d) is based on its reasoning that "if Rule 54(d) grants courts discretion to tax whatever costs may seem appropriate, then § 1920, which enumerates the costs that may be taxed, serves no role whatsoever." *Id.*

If §1920 played a role outside of the Rule 54(d) framework, the *Crawford* reasoning would collapse. If, as IDOC contends, § 1920 provided for payments to third parties, which are completely outside of the Rule 54(d) umbrella, then construing Rule 54(d) to provide discretion beyond the confines of §1920 would not leave § 1920 with "no role whatsoever." The reasoning in *Crawford* is premised on the thesis that § 1920 *only* authorizes payments as directed by Rule 54(d).

Ignoring this direct discussion of the role of § 1920, IDOC instead proposes a strained interpretation of both the statutory language and the language in *Crawford*. IDOC begins by noting correctly that *Crawford* states that the statutory phrase "fees . . . for . . . witnesses" is exhaustively defined in § 1821, which specifies the daily fees, travel allowances and so on, which may be paid to witnesses. Beyond this, however, IDOC contends that *all* of the payments authorized by § 1821 are included in the statutory term "fees" and none in the term "disbursements." On this basis IDOC then argues that, given that statutes are to be construed so as to give effect to each word, the word "disbursements" in § 1920(3) must be given some distinct meaning. IDOC then puts the roof on this house of cards by urging that "disbursements" therefore encompasses expenses incurred by the custodian of a prisoner-witness in complying with a writ of habeas corpus ad testificandum.

This chain of reasoning is flawed in its inception. As noted above, the Court in *Crawford* did state that "the witness fee specified in § 1920(3) is defined in 28 U.S.C. § 1821." However, the Court never suggested that § 1821 defines only the *fees* authorized by § 1920(3) and not the disbursements. Indeed, the Court's reasoning makes it quite clear that the fees and disbursements referred to in §1920(3) are both included in § 1821. The Court's statement regarding the relationship between § 1920(3) and § 1821 reads in its entirety as follows:

> The witness fee specified in § 1920(3) is defined in 28 U.S.C. § 1821:
>
> (a)(1) Except as otherwise provided by law, a witness in attendance at any court of the United States . . . shall be paid the fees and allowances provided by this section.
>
> . . . .
>
> (b) A witness shall be paid an attendance fee of $30 per day for each day's attendance. A witness shall also be paid the attendance fee for the time necessarily occupied in going to and returning from the place of attendance at the beginning and end of such attendance or at any time during such attendance.
>
> *Crawford*, 482 U.S. at 440-41 (ellipses in original).

Hence, the Court simply held that § 1920(3)'s witness fee is defined by these two subsections of § 1821. There is no suggestion that the entire section defines solely witness fee, leaving disbursements undefined.

IDOC's reliance on the general rule of statutory construction that statutes be construed so as to give effect to all of their language is thus unavailing. Many, if not most, of the items covered by § 1821 are not "fees" in any ordinary sense of the term. These items, such as travel reimbursements, are deemed "allowances" by § 1821. Surely they could easily qualify as disbursements under § 1920(3). Nothing more than this natural reading of § 1821 is needed to save the word "disbursements" in § 1920 from statutory oblivion.

We thus conclude that § 1920(3) does not empower the district court to order the reimbursement sought by IDOC. In so concluding we are in accord with the Sixth Circuit which considered an analogous issue and concluded that "no provision in § 1920 permits courts to tax as costs against a losing party the custodian's expenses incurred in complying with a prisoner's writ of habeas corpus ad testificandum." *Sales*, 873 F.2d at 119.

We now turn to the question whether the common law context of § 2241 can support the reimbursement requested by IDOC. As we recently noted in *Ivey v. Harney*, 47 F.3d 181, 183 (7th Cir. 1995), "laws often require or permit a court to do something without providing details. Omission leaves in place the common law powers of the federal courts, and using these interstitial powers the courts put flesh on the statutory bones." As we pointed out with approval in *Ivey*, the Second Circuit in *Rivera v. Santirocco*, 814 F.2d 859 (2d Cir. 1987), relied on the common law background of the writ of habeas corpus ad testificandum in upholding a district court's ordering the Marshals Service and FBI to take custody of a state prisoner during a trial in which that prisoner was a necessary witness.

The power to fill interstices, however, does not imply a power to add extensions. Indeed, that was the lesson of this court's decision in *Ivey*. In *Ivey*, we dealt with the question whether the All Writs Act, 28 U.S.C. § 1651(a), authorizes a district court to order a state department of corrections to transport a prisoner some distance to be examined by a physician in the pre-trial phase of a lawsuit. The court found that this extrapolation from a court's authority to command a state custodian to produce a prisoner was precluded by the language of § 2241(c). The statute provides that "the writ of habeas corpus shall not extend to a prisoner *unless* . . . it is necessary to bring him into court to testify or for trial." (emphasis added).[1]

IDOC does not persuade us that the common law writ of habeas corpus was coupled with any power to charge against the loser the costs of bringing friendly witnesses to court. It is true that the Ninth Circuit in

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[1] In *Ivey*, we failed to find common law authority for an order requiring a custodian to produce a prisoner for an examination by an expert witness in part because "nothing in the common law supports an order directing a third party to provide free services that facilitate litigation." 47 F.3d at 185. IDOC quotes this statement in support of its argument. The statement, however, referred to an order which we found to be outside the compass of the writ of habeas corpus ad testificandum. It supported our finding that the district court lacked the power even to issue the order in question. In contrast to the situation in *Ivey*, both statute and common law "support an order directing a third party to provide free services that facilitate litigation" when the third party is the custodian of a prisoner and the order is a writ of habeas corpus ad testificandum. IDOC does not contest this authority. The cited statement from *Ivey* thus has no bearing on the issue at hand.

*Wiggins v. County of Alameda*, cited by IDOC, concluded that the district court had discretion to allocate costs of transportation of a state prisoner between state and federal authorities. 717 F.2d 466, 469 (9th Cir. 1983) (upholding allocation to state of all costs of transporting prisoner-plaintiff), *cert. denied sub nom. California Dept. of Corrections v. United States*, 465 U.S. 1070 (1984). But that case has been overruled on this point by the Supreme Court in *Pennsylvania Bureau of Correction v. United States Marshals Service*, 474 U.S. 34 (1985), which held that only *custodians* of prisoners could be ordered to bear the costs of transporting them pursuant to a writ of habeas corpus ad testificandum. With regard to reimbursing the state for its expenses in transporting a prisoner, however, *Wiggins* found that "when there is no statutory authority . . . authorizing reimbursement to the state for the costs of compliance with such a writ, then there is no basis upon which the state can seek compensation for its expenses." 717 F.2d at 469. The *Wiggins* court went on to say, and we agree, that "enactment of a statute, compliance with which will require a state or entity to incur costs, does not in itself create a right to reimbursement." *Id.*

IDOC cites only one case in which the cost of transporting prisoner-witnesses was taxed as costs against a losing plaintiff. *Marks v. Calendine*, 80 F.R.D. 24 (N.D. W. Va. 1978), *aff'd sub nom. Flint v. Haynes*, 651 F.2d 970 (4th Cir. 1981), *cert. denied*, 454 U.S. 1151 (1982). In that case, the plaintiff sued the warden of the prison in which the prisoner-witnesses were incarcerated. The costs of transporting the witnesses were assumed by the court to be costs borne by the defendant for which he could be reimbursed. The case provided no analysis of whether costs may be awarded to non-parties and the propriety of the transportation cost award in particular was apparently not raised on appeal. The opinion affirming the district court

decision in *Marks* focused entirely on the question whether costs may be taxed against indigents *at all*. *Flint v. Haynes*, 651 F.2d 970 (4th Cir. 1981), *cert. denied*, 454 U.S. 1151 (1982). We are not persuaded by these decisions that the taxation of costs against non-parties is authorized.

In summary, IDOC has not persuaded us to adopt its creative interpretation of 28 U.S.C. § 1920(3), an interpretation which is at odds with the reasoning of the Supreme Court in *Crawford* and which is given no support by this court's opinion in *Ivey*. Neither has it produced any convincing authority that there is a common law basis for a district court to authorize the requested reimbursement. We therefore affirm the judgment of the district court.

AFFIRMED.

A true Copy:

Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

| | | |
|---|---|---|
| BILL SAMPLEY and MICHAEL HOLLAND, | ) | |
| Plaintiffs, | ) | |
| vs. | ) | CAUSE NO. S88-405M |
| JACK DUCKWORTH, | ) | |
| Defendant. | ) | |

MEMORANDUM AND ORDER

By order entered November 22, 1994, the court deferred ruling on Supt. Duckworth's verified bill of costs and afforded Supt. Duckworth an opportunity to file an affidavit in support of the items sought as part of the costs as required by 28 U.S.C. § 1924, detailing why the unidentified discovery is recoverable and was necessary. The court's November 22 order also denied the Indiana Department of Correction's "Petition for Reimbursement of Costs Expended Pursuant to Court Order." The court has discretion pursuant to Fed. R. Civ. P. 54(d) and § 1920 to determine whether the prevailing party's expenses are taxable costs. E.g., SCA Services, Inc. v. Lucky Stores, 599 F.2d 178, 181 (7th Cir. 1979).

With the Declaration in Support of Taxation of Costs (filed December 16, 1994), Supt. Duckworth has satisfied his burden of showing that the expenses claimed in his verified bill of costs, including the cost for 576 copies of discovery, were accurate and necessary. See M.T. Bonk

Co. v. Milton Bradley Co., 945 F.2d 1404, 1410 (7th Cir. 1991); Northbrook Excess & Surplus Ins. Co. v. Procter & Gamble Co., 924 F.2d 633, 641-644 (7th Cir. 1991). The court finds that the 576 copies of discovery -- copies provided during discovery and prior to trial at the request of the plaintiffs and/or plaintiffs' counsel -- are taxable costs. Therefore, Supt. Duckworth's bill of costs may be taxed against the plaintiffs. 28 U.S.C. § 1924.

The Indiana Department of Correction ("DOC"), a nonparty to this cause, has asked the court to alter or amend its November 22 Order which denied DOC's petition for reimbursement of costs expended pursuant to the court's orders. DOC primarily relies on equity and the court's authority to tax costs against parties. DOC also relies on 28 U.S.C. § 1920[1] and the Seventh Circuit's decision in McGill v. Faulkner, 18 F.3d 456 (7th Cir.), cert. denied, 115 S. Ct. 233 (1994), and Rule 71 of the Federal Rules of Civil Procedure. None of these provide the court with authority to award costs to the DOC under the circumstances presented.

A motion for reconsideration should be denied unless it clearly demonstrates manifest error of law or fact or presents newly discovered evidence. Dresser Indus., Inc. v. Pyrrhus AG, 936 F.2d 921, 936 (7th Cir. 1991); Publishers Resource, Inc. v. Walker-Davis Publications, Inc., 762 F.2d 557, 561 (7th Cir. 1985); Amcast Indus. Corp. v. Detrex Corp., 822 F. Supp. 545 (N.D. Ind. 1992), aff'd in part, rev'd in part on other grounds, 2 F.3d 746 (7th Cir. 1993), and cert. denied, 114 S. Ct. 691 (1994). A motion for reconsideration "cannot be used to

[1] This statute authorizes an award of witness fees. Witness fees are fees paid to the witness. 28 U.S.C. § 1821. Witnesses who are incarcerated are not entitled to receive any witness fees. 28 U.S.C. § 1821(f).

raise arguments that could, and should, have been made before the judgment issued," Federal Deposit Ins. Corp. v. Meyer, 781 F.2d 1260, 1268 (7th Cir. 1986); see also Holstein v. City of Chicago, 149 F.R.D. 147, 148 (N.D. 111. 1993), aff'd, 29 F.3d 1145 (1994); "cannot be used to argue a case under a new legal theory," Id.; and "cannot in any case be employed as a vehicle to introduce new evidence that could have been adduced during pendency of the . . . motion." Keene Corp. v. International Fidelity Ins. Co., 561 F. Supp. 656, 665-666 (N.D. Ill. 1982), aff'd, 735 F.2d 1367 (7th Cir.), and aff'd, 736 F.2d 388 (7th Cir. 1984); see also Rothwell Cotton Co. v. Rosenthal & Co., 827 F.2d 246, 251 (7th Cir.), as amended, Rosenthal & Co. v. Rothwell Cotton Co. 835 F.2d 710 (7th Cir. 1987); Publishers Resource, Inc. v. Walker-Davis Publications, Inc., 762 F.2d 557, 561 (7th Cir. 1985) (both cases quoting Keene Corp. v. Int'l Fidelity Ins., 561 F. Supp at 665-66). The party moving to reconsider must establish that, through the exercise of due diligence, it could not have presented the "newly discovered evidence" during pendency of the earlier motion. Rothwell Cotton Co. v. Rosenthal & Co., 827 F.2d at 251.

DOC has not demonstrated a manifest error of law or fact in the court's denial of its petition for reimbursement of costs; importantly, DOC has not provided the court with any authority to establish that, DOC as a non-party, is entitled to reimbursement of its costs incurred in transporting the prisoner witnesses and Mr. Sampley to trial. As this court stated previously, the DOC's claim is not unreasonable; however, the court must deny the DOC's motion to alter or amend the denial of reimbursement of costs for the want of authority to so reimburse DOC.

For the foregoing reasons, the court:

(1) GRANTS Supt. Duckworth's verified bill of costs, AWARDING Supt. Duckworth $564.00 in costs to be TAXED against the plaintiffs Michael Holland and Bill Sampley; and

(2) DENIES the Indiana Department of Correction's motion to alter or amend judgment denying reimbursement of costs (filed December 9, 1994 (#219)).

The clerk of the court is directed to enter judgment, pursuant to Fed. R. Civ. P. 58, accordingly.

SO ORDERED.

ENTERED: February 27, 1995

/s/ Robert L. Miller, Jr.
Robert L. Miller, Jr., Judge
United States District Court

cc: T. Quigley
D. Moore
B. Sampley

# United States District Court

## Northern District of Indiana

BILL SAMPLEY
MICHAEL HOLLAND

JUDGMENT IN A CIVIL CASE

v.

Case No. 3:88CV405RM

JACK DUCKWORTH

[ ] Jury Verdict. This action came before the court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

[XX] Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that Supt. Duckworth's bill of costs is granted and Supt. Duckworth is awarded $564.00 in costs to be taxed against plaintiffs Michael Holland and Bill Sampley.

Interest rate: 6.57%

This document entered pursuant to Rules 79(A) and 58 of the Federal Rules of Civil Procedure on:

March 3, 1995 Geraldine J. Crockett

By: /s/
Deputy Clerk

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

| | | |
|---|---|---|
| BILL SAMPLEY and MICHAEL HOLLAND, | ) | |
| Plaintiffs, | ) | |
| vs. | ) | CAUSE NO. S88-405M |
| JACK DUCKWORTH, | ) | |
| Defendant. | ) | |

MEMORANDUM AND ORDER

This cause is before the court on the following post-trial motions:

(1) the Indiana Department of Correction's "Petition for Reimbursement of Costs Expended Pursuant to Court Order" (filed August 11, 1994 (#210));

(2) the plaintiffs' Motion for Continuance of Taxation of Costs (filed August 22, 1994 (#215));

(3) the plaintiff Bill Sampley's Motion for an Enlargement of Time So Plaintiffs' Can Respond to Indiana Department of Correction's Petition for Reimbursement

(sic) of Costs Expended Pursuant to Court Order (filed August 17, 1994 (#213)); and

(4) Bill Sampley's Motion for Leave to File Delayed Notice of Appeal (filed August 17, 1994 (#212)).

For the reasons which follow, the court strikes Mr. Sampley's motion for an enlargement of time and motion for leave to file a delayed notice of appeal, grants the plaintiffs' motion for continuance of taxation of costs, and denies the Indiana Department of Correction's petition. The court allows Supt. Duckworth to and including December 30, 1994 to file an affidavit in support of his verified bill of costs.

A. Motion for Leave to File Delayed Notice of Appeal

Mr. Sampley has filed a motion for leave to file a delayed notice of appeal, purportedly proceeding pro se. Mr. Sampley states that he seeks such leave because he has allegedly "been dumped by his attorney, without notice." Mr. Sampley further states that he:

> had not intended to file an appeal after the trial . . . until he learned that Defendant intended to seek costs. Plaintiff informed his attorney . . . that he did want to appeal the costs aspect of the final judgment and thought she would file a Notice of Appeal. Plaintiff was informed . . . in a letter from his . . . attorney, that she no longer had time to spend on the case. . . .

Mr. Sampley states that he received the letter from his attorney on August 15, 1994.

Rule 4 of the Federal Rules of Appellate provides in pertinent part:

> (1) Except as provided in paragraph (a)(4) of this Rule, in a civil case in which an appeal is permitted by law as of right from a district court to a court of appeals the notice of appeal required by Rule 3 must be filed with the clerk of the district court within 30 days after the date of entry of the judgment or order appealed from . . . .
>
> * * *
>
> (5) The district court, upon a showing of excusable neglect or good cause, may extend the time for filing a notice of appeal upon motion filed not later than 30 days after the expiration of the time prescribed by this Rule 4(a). . . . No such extension shall exceed 30 days past such prescribed time or 10 days from the date of entry of the order granting the motion, whichever occurs later.

Fed. R. App. P. 4(a)(1) and (5). Assuming that Mr. Sampley intends to appeal from the June 27 Order in which the court deferred ruling on Supt. Duckworth's petition for costs, Mr. Sampley's motion, filed on August 17, would be timely.[1] Under this assumption, were the court to grant

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[1] Under Rule 4(a)(1), a notice of appeal would be due July 27 and consequently, under Rule 4(a)(5), a motion for extension of time to file a notice of appeal would be due no later than August 26.

Mr. Sampley's motion, Mr. Sampley would have ten days from the date of entry of this order within which to file his notice of appeal. Assuming that Mr. Sampley intends to appeal from the court's order taxing costs against the plaintiffs, because the court has not entered an order awarding costs, the time for filing a notice of an appeal has not yet commenced.

Since an order granting or denying an award of costs following an entry of final judgment is an order from which an appeal lies, see Estate of Borst v. O'Brien, 979 F.2d 511, 517 (7th Cir. 1992) (affirming trial court's award of attorney fees and costs with a reduction in costs), an award of costs is a judgment, see Fed. R. Civ. P. 54(a), and thus not effective and not enforceable until the clerk has complied with Rule 58.[2] Because the court's order

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[2] A judgment is not effective until it is set forth on a separate document pursuant to Rule 58 of the Federal Rules of Civil Procedure and entered on the district court's civil docket pursuant to Rule 79(a). See Fed. R. Civ. P. 58; see also TMF Tool Co. v. Muller, 913 F.2d 1185, 1188 (7th Cir. 1990) ; Jones v. Jones Bros. Const. Corp., 126 F.R.D. 54, 55 (N.D. Ill. 1989). The clerk must comply with the rules before a court order can become an effective judgment. Jones v. Jones Bros. Const. Corp., 126 F.R.D. at 55-56. The court finds the reasoning of Jones Bros. Const. Corp. persuasive:

> Rule 58 says nothing about there being only one Rule 58 judgment per lawsuit, instructing instead that '[e]very judgment shall be set forth on a separate document.' . . . Fed. R. Civ. P. 54(a) states that '[j]udgment as used in these rules includes a decree and any order from which an appeal lies.' Since an award of attorney's fees following an entry of final judgment is an order from which an appeal

awarding costs to Supt. Duckworth has not been set forth on a separate document pursuant to Rule 58 and entered on the district court's civil docket pursuant to Rule 79(a), the judgment is not yet effective and enforceable against the plaintiffs.

Although the court is sympathetic to Mr. Sampley's position, the court will not grant Mr. Sampley's motion because the motion should be stricken as improper. Despite any allegations contained in Mr. Sampley's motion, when Mr. Sampley filed his motion he was, and still is, represented by counsel, who filed objections and a motion on behalf of the plaintiffs on August 19, two days after Mr. Sampley filed his motion, purportedly proceeding pro se. Accordingly, Mr. Sampley's motion to file delayed notice of appeal should be stricken.

B. Motion for Enlargement of Time

For the same reason, the court finds that Mr. Sampley's motion for an enlargement of time should be stricken. Mr. Sampley's motion for an enlargement of time was filed on August 17. Two days later, plaintiffs' counsel filed "Plaintiffs' Objections to Requests for Costs and Motion for continuance of Taxations of Costs" on behalf of the plaintiffs. Thus, when Mr. Sampley filed his motion for an enlargement of time he was, and still is, represented by counsel.

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> lies, . . . such an award is a judgment, which does not become effective, and thus does not become enforceable . . . until the clerk complies with Rule 58.

126 F.R.D. at 56 (citation omitted).

Moreover, the plaintiffs' objection, filed by counsel for the plaintiffs, responds in part to DOC's petition for reimbursement of costs. As a result, Mr. Sampley's motion for an enlargement of time to respond is moot.

Accordingly, the court finds that Mr. Sampley's motion for an enlargement of time should be stricken.

C. Plaintiffs' Motion for Continuance of Taxation of Costs

By its June 27 Order, the court concluded that Supt. Duckworth, as the prevailing party, is entitled to an award of costs, but deferred ruling on the petition of costs to allow Supt. Duckworth to file a verified bill of costs. Supt. Duckworth filed his verified bill of costs in the amount of $564.00.

The plaintiffs filed their objections to Supt. Duckworth's verified bill of costs and their motion for a continuance of the taxation of costs. The plaintiffs contend that: (1) photocopying expenses are not recoverable under 28 U.S.C. § 1920; (2) the $0.30 rate per page exceeds the customary rate of photocopying businesses in the area; (3) that plaintiffs' counsel has no recollection of receiving 576 pages in response to discovery; and (4) an extra set of photocopies of discovery materials is not recoverable. The plaintiffs also restate two arguments made in their previous response to Supt. Duckworth's motion for attorney fees and costs. As the court ruled previously that Supt. Duckworth is entitled to an award of costs, the court need not revisit those two issues here.

Rule 54(d)(1) of the Federal Rules of Civil Procedure, which provides for the taxation of costs, provides in pertinent part:

> [C]osts other than attorneys' fees shall be allowed as of course to the prevailing party unless the court otherwise directs . . . . Such costs may be taxed by the clerk on one day's notice. On motion served within 5 days thereafter, the action of the clerk may be reviewed by the court.

The clerk's August 11 Notice states that costs were to be taxed in this cause on August 22. The plaintiffs served their motion to continue the taxation of costs on August 18. Thus, the plaintiffs' motion was served within five days of the date on which costs were to be taxed and consequently, the court may review that taxation of costs.

28 U.S.C. § 1920 governs awards of costs to the prevailing party. See, e.g., Estate of Borst v. O'Brien, 979 F.2d 511, 517 (7th Cir. 1992). 28 U.S.C. § 1920 provides:

> A judge . . . in the United States may tax as costs the following:
>
> (1) Fees of the clerk and marshals;
>
> (2) Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case;
>
> (3) Fees and disbursements for printing and witnesses;

> (4) Fees for exemplification and copies of papers necessarily obtained for use in the case;
>
> (5) Docket fees under § 1923 of this title;
>
> (6) Compensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services under § 1828 of this title.
>
> A bill of costs shall be filed in the case and, upon allowance, included in the judgment or decree.

28 U.S.C. § 1920. The expense for copying materials reasonably necessary are recoverable costs under § 1920. E.g., State of Ill v. Sangamo Const. Co., 657 F.2d 855, 867 (7th Cir. 1981). To the extent expenses are recoverable under § 1920, the prevailing party must show that the costs were reasonably necessary. See M.T. Bonk Co. v. Milton Bradley Co., 945 F.2d 1404, 1410 (7th Cir. 1991); Northbrook Excess and Surplus Ins. Co. v. Procter & Gamble Co., 924 F.2d 633, 641-644 (7th Cir. 1991). The losing party bears the burden of establishing that the prevailing party is not entitled to the costs requested. Meister v. Georgia-Pacific Corp., No. 92 C 6616, 1994 WL 127309, at *1 (N.D. Ill. April 7, 1994). The court has discretion pursuant to Fed. R. Civ. P. 54(d) and § 1920 to determine whether the prevailing party's expenses are taxable costs. E.g., SCA Services, Inc. v. Lucky Stores, 599 F.2d 178, 181 (7th Cir. 1979).

The court cannot yet determine the total amount of costs to be taxed against the plaintiffs, however. Supt. Duckworth's verified bill of costs seeks an award of costs, including the expense of "the production and copying of. . . documents with sufficient copies for filing, service and retention of two copies for counsel . . . ." The documents include 576 copies of unidentified discovery in the amount of $172.80; three trial notebooks (1272 copies) in the amount of $381.60; 10 copies (20 pages total) of the floor plan used as demonstrative evidence in the amount of $6.00; and 2 copies (12 pages total) of the proposed interrogatory form in the amount of $3.60. Supt. Duckworth's costs total $564.00.

To the extent expenses such as those in the Supt. Duckworth's verified bill of costs are recoverable at all under § 1920, he must show that the costs were necessary. See M.T. Bonk Co. v. Milton Bradley Co., 945 F.2d 1404, 1410 (7th Cir. 1991); Northbrook Excess & Surplus Ins. Co. v. Procter & Gamble Co., 924 F.2d 633, 641-644 (7th Cir. 1991). Although it is apparent that the costs for the trial notebooks, floor plan, and proposed interrogatory form were necessary, Supt. Duckworth has ventured no such showing with respect to the unidentified discovery. Therefore, the court defers ruling on Supt. Duckworth's bill of costs to enable Supt. Duckworth further opportunity to show that the costs for the unidentified discovery was necessary.

Furthermore, Supt. Duckworth has failed to comply with 28 U.S.C. § 1924 which provides:

> Before any bill of costs is taxed, the party claiming any item of cost or disbursement shall attach thereto an affidavit, made by himself or by his duly authorized

> attorney or agent having knowledge of the facts, that such item is correct and has been necessarily incurred in the case and that the services for which fees have been charged were actually and necessarily performed.

Supt. Duckworth's verified bill of costs did not have an affidavit attached to it as required by § 1924. The attached "verification" made by his counsel does not suffice.[3] Without an affidavit, the bill of costs may not properly be taxed. 28 U.S.C. § 1924.

Accordingly, the court defers ruling on Supt. Duckworth's verified bill of costs to allow the submission of an affidavit in support of the items sought as part of the costs as required by 28 U.S.C. § 1924, detailing why the unidentified discovery was necessary. The court affords Supt. Duckworth to and including December 30, 1994 within which to do so.

D. DOC's Petition for Reimbursement

The Indiana Department of Correction ("DOC"), a nonparty to this cause, has filed a petition for reimbursement of costs expended pursuant to the court's orders, see court orders entered March 3, 1994 (docket entry ##157-166), regarding the transportation of a number of prisoner witnesses and plaintiff Sampley for the trial of this cause. In producing the witnesses and the plaintiff, DOC provided security and transportation. DOC represents that it incurred more than $5,000.00 in transporting the prisoner witnesses, providing for their security, and providing them meals during trial. DOC represents that it

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[3] The Verification states "I declare under penalty of perjury that the foregoing statement of the costs in this cause is true and correct."

incurred $1,143.54 in salary expenses for prison personnel present in the courtroom during trial and $4000.01 for vehicle use and staffing for transportation of Mr. Sampley and the other prisoner witnesses. DOC represents that the costs it seeks represent solely the expenses incurred in transporting witnesses from the Indiana State Prison or the Maximum Control Complex.

DOC contends that if it is not reimbursed for its expenses that it would have been compelled to expend funds without due process and in violation of the Eleventh Amendment. DOC seeks an order that the plaintiffs be jointly and severally liable for the costs of transportation and security of the prisoner witnesses and Mr. Sampley. DOC seeks an order which directs that the costs be applied as a "freeze" on Bill Sampley's inmate trust account and that the funds in the account or to be entered into the account be applied toward the costs until the award is satisfied in full.

The plaintiffs object to DOC's petition for reimbursement. The plaintiffs contend that DOC is not a "prevailing party" entitled to reimbursement of costs. The plaintiffs contend that to allow reimbursement would violate due process and equal protection.

The court's ultimate inquiry is whether non-party DOC is entitled to reimbursement of costs incurred in transporting prisoner witnesses and the plaintiff in this § 1983 action. Before the court may reach that ultimate inquiry, however, the court must determine whether DOC has standing to petition for reimbursement of its costs incurred.

DOC has provided the court with no authority to establish that, as a non-party, it is entitled to petition the

court for reimbursement of its costs incurred in transporting the prisoner witnesses and Mr. Sampley.[4] Rule 71 of the Federal Rules of Civil Procedure does not provide the authority, because the court's orders directing DOC to produce the prisoner witnesses and Mr. Sampley were arguably not made in DOC's "favor" and because DOC is not seeking to enforce those court orders. Because DOC has not established that its petition for costs is properly before the court, the (sic) must refuse to consider DOC's petition for reimbursement of costs.

In any event, as the plaintiffs contend, DOC as a non- party, is not a prevailing party for purposes of awarding costs pursuant to Rule 54. See Fed. R. Civ. P.

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[4] The authorities cited by DOC support only the taxation of costs against a non-prevailing party, see 28 U.S.C. § 1920, Fed. R, Civ. P. 54(d), that paupers are not exempt from this rule, see 28 U.S.C. § 1915, McGill v. Faulkner, 18 F.3d 456 (7th Cir. 1994), cert. denied, 115 S.Ct. 233 (U.S. Oct. 3, 1994), Flint v. Haynes, 651 F.2d 970 (4th Cir. 1981), cert. denied, 454 U.S. 1151 (1982), and that indigent criminal defendants have no absolute right to subpoena witnesses at the government's expense. See United States v. McGaha, 205 F. Supp. 949, 951 (E.D. Tenn. 1962). In a footnote, Jackson v. Vasquez, 1 F.3d 885, 891 n.5 (9th Cir. 1994), raised, but did not decide whether a federal court order compelling the state to transport a state prisoner for medical tests violated due process and the Eleventh Amendment.

Without question, the district court has the authority to order custodians to produce state prisoners in federal court. Pennsylvania Bureau of Correction v. United States Marshals Service, 474 U.S. 34, 40-41 (1985).

54(d) ("costs. . . shall be allowed as of course to the prevailing party").

This is not to reject the DOC's claim as unreasonable. There is a tendency for federal courts to treat state correctional agencies as de facto parties to all prisoner litigation, whether by requiring witnesses and litigants to be produced, accommodating judicial visits, disclosing addresses to the United States Marshal to effectuate service of process, and so on. Nonetheless, no authority exists for this court to assess costs for the benefit of one other than a prevailing party.

Accordingly, the court denies DOC's petition for reimbursement of costs.

E. Conclusion

For the foregoing reasons, the court:

(1) STRIKES Bill Sampley's Motion for an Enlargement of Time So Plaintiffs' Can Respond to Indiana Department of Correction's Petition for Reimbursement (sic) of Costs Expended Pursuant to Court Order (filed August 17, 1994 (#213));

(2) STRIKES Bill Sampley's Motion for Leave to File Delayed Notice of Appeal (filed August 17, 1994 (#212));

(3) GRANTS the plaintiffs' Motion for Continuance of Taxation of Costs (filed August 22, 1994 (#215));

(4) DEFERS ruling on Supt. Duckworth's verified bill of costs, AFFORDING

Supt. Duckworth to and including December 30, 1994 within which to file an affidavit in support of the items sought as part of the costs as required by 28 U.S.C. § 1924, detailing why the unidentified discovery is recoverable and was necessary; and

(5) DENIES the Indiana Department of Correction's "Petition for Reimbursement of Costs Expended Pursuant to Court Order" (filed August 11, 1994 (#210)).

SO ORDERED.

SO ORDERED.

ENTERED: November 22, 1994

/s/ Robert L. Miller, Jr.
Robert L. Miller, Jr., Judge
United States District Court

cc: J. Menadue
D. Moore
B. Sampley